

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEVEN LEE RAMEY)	
Claimant)	
VS.)	
)	Docket Nos. 225,707 & 228,048
SHORT CREEK ENTERTAINMENT; and)	
AUTOMOTIVE CONTROLS CORPORATION)	
Respondents)	
AND)	
)	
INSURANCE CARRIER UNKNOWN; and)	
AUTOMOTIVE CONTROLS CORPORATION)	
Insurance Carriers)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals the preliminary hearing Order of Administrative Law Judge John D. Clark dated July 27, 1998. In the Order, Judge Clark found claimant suffered accidental injury arising out of and in the course of his employment with Short Creek Entertainment, and assessed liability for claimant's medical treatment and temporary total disability compensation to Short Creek Entertainment. Costs of the July 22, 1998, transcript were assessed against the Kansas Workers Compensation Fund.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment with Automotive Controls Corporation?
- (2) At the preliminary hearing, respondent Automotive Controls Corporation raised the issue of notice as a defense to claimant's alleged accidental injury with Automotive Controls Corporation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was injured on August 24, 1996, while working for Short Creek Entertainment as a bouncer. At the time, claimant was a part-time employee with Short Creek Entertainment, but working full time with Automotive Controls Corporation. Claimant was off work from both Short Creek Entertainment and Automotive Controls Corporation through July 7, 1997, undergoing a lengthy, conservative treatment program, and ultimately having surgery on the shoulder under the hands of Dr. V. C. Patel, orthopedic surgeon, on October 25, 1996. Claimant attempted to return to work with Automotive Controls Corporation with restrictions in March 1997. Respondent was unable to accommodate claimant's restrictions at that time. Claimant did return on July 7, 1997, but worked only 2.7 hours. When claimant returned to work with Automotive Controls Corporation, he was placed on the solenoid line. While this was a regular duty job, it was considered very light in nature. A videotape of the specific job claimant was performing was stipulated into evidence by the parties.

After working 2.7 hours, claimant advised respondent's plant nurse, Carolyn Leiker, that he was unable to continue performing this job, indicating that his right hand and arm were shaky, and his right hand was numb and cold.

Claimant alleged that, before his return to work on July 7, 1997, he was feeling "real good" and was able to return to work with respondent. However, a review of the medical records from Dr. Patel before July 7, 1997, indicate claimant had ongoing problems in his right arm and shoulder. Specifically, on July 3, 1997, claimant was complaining that both of his hands were going numb.

The medical records from Dr. Patel's office dated July 21, 1997, and July 23, 1997, indicate that claimant attempted to go back to work but was unsuccessful in doing so. There is no indication in the medical records at that time that claimant suffered any aggravation or additional injury to his arm or shoulder during his attempted return to employment with Automotive Controls Corporation.

Claimant did not advise respondent, Automotive Controls Corporation, of this alleged injury until August 15, 1997. At that time, claimant contacted Barbara Logan, supervisor in Safety and Loss Control for respondent, and advised of the alleged July 7, 1997, injury. Ms. Logan testified that, at the time of her conversation with claimant, he advised that it was the same shoulder he had had surgery on but "actually it goes back to Short Creek but we thought if we could file with A.C.C. it would hurry it up."

In proceedings under the Workers Compensation Act, the burden of proof is on claimant to establish claimant's right to an award of compensation by proving the various

conditions upon which claimant's right depends by a preponderance of the credible evidence. K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

It is the function of the trier of facts to decide which testimony is more accurate and credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence presented in the case, and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The medical records in evidence at the time of the claimant's alleged July 7, 1997, injury do not indicate a second injury suffered while claimant was employed with Automotive Controls Corporation. In addition, claimant only returned to work for 2.7 hours at what appears to be a light-duty job. The Appeals Board finds, based upon a review of the evidence, that claimant has failed to prove accidental injury arising out of and in the course of his employment with respondent Automotive Controls Corporation on July 7, 1997.

K.S.A. 44-520 requires that notice be given to the employer within 10 days after the date of accident stating the time and place and particulars thereof. In this instance, claimant acknowledges notice was not provided to respondent until August 15, 1997, more than 10 days beyond the July 7, 1997, date of accident. While K.S.A. 44-520 does allow additional time to provide notice if just cause can be shown as to why claimant failed to notify respondent of the accident, there was no argument by claimant and no evidence presented regarding what, if any, just cause may have been present in this case. The Appeals Board, therefore, finds, for preliminary hearing purposes, that claimant has failed to satisfy the requirements of K.S.A. 44-520 as notice was not properly given in a timely fashion in this instance.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated July 27, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Garry W. Lassman, Pittsburg, KS
E. L. Lee Kinch, Wichita, KS

STEVEN LEE RAMEY

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John D. Clark, Administrative Law Judge
Philip S. Harness, Director